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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF
1996

DOCKET NO. T-00000A-97-0238**QWEST'S BRIEF REGARDING DARK FIBER IMPASSES**

Qwest Corporation ("Qwest") submits this brief regarding the impasse issues in this proceeding regarding dark fiber. There are five such issues. As demonstrated herein, each must be resolved in Qwest's favor as a matter of law.

DF1: Whether the unbundling requirement extends beyond the RBOC, Qwest Corporation? (Section 9.7.1)

AT&T contends that the unbundling requirements of section 251(c)(3) pertain to entities beyond Qwest Corporation.¹ AT&T offered no rationale, legal or factual, for its position in the workshops.² Indeed, there is no justifiable rationale for AT&T's position.³

The unbundling obligations of section 251(c)(3) apply only to ILECs.⁴ Qwest Corporation is the only ILEC in the Qwest family of corporations. As part of the

¹ Transcript at 1401:3-7, 1402:23-1403:7.

² *Id.*

³ To the extent AT&T argues for a new obligation, the FCC has made it crystal clear that 271 dockets are not the correct venue. *Memorandum Opinion and Order*, In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for

Qwest/U S WEST merger, U S WEST Communications, Inc. became Qwest Corporation. Prior to the merger, Qwest had no ILEC operations, and U S WEST Communications, Inc. was the only ILEC within the U S WEST family of entities.⁵ Thus, Qwest Corporation is the only ILEC within the Qwest family.⁶ Consequently, the unbundling requirements of section 251(c)(3) apply only to Qwest Corporation.

DF3: Whether Qwest must unbundle dark fiber it does not own in meet point arrangements? (Section 9.7.1)

In a meet point arrangement, two entities combine to make a fiber route between two points. As part of the arrangement, the route is divided into two parts that come together at the meet point, and each entity owns one of the parts.⁷ Usually, each entity has some rights to send traffic over the fiber owned by the other party.⁸

As Qwest made clear at the workshop, it will unbundle dark fiber that it owns as part of a meet-point arrangement.⁹ For this purpose, Qwest added the following language to the SGAT:

Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, FCC 01-29 (rel. Jan. 22, 2001) ¶19 (*Kansas/Oklahoma Order*).

⁴ Section 251 (c) (3) is a subsection of section 251(c) which begins with the following preamble:

ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

47 U.S.C. §251(c) (emphasis added).

⁵ These facts were established in Qwest's January 24, 2001 filing. As part of that filing, Qwest submitted the Second Supplemental Affidavit Of Karen A. Stewart Emerging Services Updates For Dark Fiber Portion Of Colorado Workshop No. 4, dated January 9, 2001, which demonstrates at pages 4-6 that Qwest Corporation is the only Qwest ILEC.

⁶ Section 251(h)(1) defines ILEC, and there is no evidence that any Qwest entity other than Qwest Corporation satisfies this definition, nor could there be.

⁷ Tr. at 1410:24-1411:11, 1412:8-1413:9 1523:4-16, 1524:7-1525:19.

⁸ *Id.*

⁹ Tr. at 1528:7-15.

9.7.2.20 Qwest shall allow CLEC to access Dark Fiber that is part of a meet point arrangement between Qwest and another local exchange carrier if CLEC has an interconnection agreement containing access to Dark Fiber with the connecting local exchange carrier. Qwest rates, terms and conditions shall apply to the percentage of the route owned by Qwest.

AT&T, however, wants Qwest to go further and unbundle dark fiber it does not own in such meet point arrangements.¹⁰ Qwest cannot and will not unbundle such dark fiber belonging to other entities.¹¹ Again, AT&T failed to provide any legal justification for how Qwest could unbundle such an asset of a third party or how it could be required to do so.¹²

**DF4: Whether Qwest must unbundle dim fiber lit with DWDM equipment?
(Section 9.7.2.4)**

At the workshop, AT&T contended that Qwest must unbundle fiber that is lit with dense wave division multiplexing (DWDM) equipment.¹³ This is sometimes called “dim fiber,” and the AT&T argument has been referred to as “spectrum unbundling.” Qwest has continually pointed out that such fiber fails the definition of dark fiber because it is lit.¹⁴ The FCC defined dark fiber as “fiber that has not been activated through connection to the electronics that ‘light’ it.”¹⁵ The lack of any such unbundling requirement has been confirmed by the fact that the FCC currently is considering whether to impose such a

¹⁰ Tr. at 1418:3-9, 1421:17-1422:3.

¹¹ Tr. at 1411:12-14, 1412:8-1413:9.

¹² As noted above, such arguments for novel duties are misplaced in a 271 docket. *Kansas/Oklahoma Order* ¶19.

¹³ Tr. at 1454:25-1455:10.

¹⁴ Tr. at 1455:17-1456:4.

¹⁵ *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (Rel. Nov. 5, 1999) (*UNE Remand Order*) ¶¶174. See also *id.* ¶325.

requirement in a rulemaking.¹⁶ AT&T appears to have realized this fallacy in its argument given that, in Colorado and the Multistate proceeding, it has conceded that no such obligation exists.¹⁷ Based on the foregoing, the Commission should find that Qwest has no obligation to unbundle fiber lit with DWDM equipment.¹⁸

DF5: Whether Qwest may impose a requirement of a significant amount of local exchange traffic on dark fiber combinations? (Section 9.7.2.9)

AT&T has challenged the following provision in the SGAT as unlawful:

9.7.2.9 CLEC shall not use UDF as a substitute for special or switched access services, except to the extent CLEC provides "a significant amount of local exchange traffic" to its end users over the UDF as set forth by the FCC (See 9.23.3.7.2).

AT&T claims that the FCC authorized such a restriction only for enhanced extended links (EELs) and not dark fiber per the FCC's *Supplemental Order Clarification* regarding the *UNE Remand Order*.¹⁹ AT&T's argument does not withstand scrutiny.

EELs are combinations of loop and transport.²⁰ Dark fiber is not a UNE unto itself, but rather a flavor of transport and loop.²¹ The local exchange traffic restriction

¹⁶Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-297 (rel. Aug. 10, 2000) ¶121. AT&T witness Wilson noted this at the workshop. Tr. at 1456:5-8. Again, 271 dockets are not the proper place to create new obligations. *Kansas/Oklahoma Order* ¶19. The need for such forbearance is underscored by the pending rulemaking proceeding.

¹⁷ 7 State Workshop Transcript, February 23, 2001 at 236:4-237:1.

¹⁸ In addition, there is very little DWDM in Qwest's network, and DWDM unbundling would necessitate new cost studies. Supplemental Affidavit Of Karen A. Stewart Emerging Services Updates For Colorado Workshop No. 4 On December 12-15, 2000 at 7:5-8 (this affidavit was submitted in Arizona on January 24, 2001).

¹⁹ Tr. at 1457:25-1458:7.

²⁰ Tr. at 1459:20-1461:9; *UNE Remand Order* ¶¶477, 480.

²¹ Tr. at 1459:20-1461:9; *UNE Remand Order* ¶¶174, 325.

pertains to combinations of loop and transport.²² Thus, the local exchange traffic restriction does properly pertain to combinations of dark fiber loop and transport.

Moreover, the FCC's rationale for the local exchange restriction pertains to dark fiber combinations of loop and transport just as it does to EELs. The FCC imposed the restriction so as to prevent unbundling requirements from interfering with access charge and universal service reform.²³ In other words, an unfettered unbundling obligation would have erased substantial amounts of access charge revenues. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of universal service. Without the local service restriction, dark fiber loop and transport unbundling could present a similar threat to access revenues and universal service.

Consequently, section 9.7.2.9 is just and proper under the FCC's *Supplemental Order Clarification*.

DF6: Whether Qwest's efforts to revise its Technical Publication 77383 regarding dark fiber to be consistent with the SGAT relate to 271 compliance and, if so, whether Qwest's efforts satisfy 271? (Sections 2.3, 9.7.2.18, 9.7.4.2)

During the workshop, AT&T claimed that Qwest's Technical Publication 77383 regarding dark fiber was not in all respects consistent with the recent SGAT changes regarding dark fiber.²⁴ Qwest offered to revise the Technical Publication and provide a

²² *Supplemental Order Clarification*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) ¶8.

²³ *Id.*

²⁴ Tr. at 1471:8-1472:7. For example, the Technical Publication did not provide for single strand access. *Id.* It should be noted that Qwest and the CLECs agreed that Qwest should commit to provide single strand access by May 31, 2001, so the omission of single strand access from the Technical Publication at this time is not actually inconsistent with the SGAT. The other claimed discrepancies stemmed from very recent SGAT changes. Tr. at 1479:23-1481:1.

new draft within 30 days.²⁵ Qwest performed on this offer, and the revised draft Technical Publication was filed and served in this proceeding on February 23, 2001. Qwest further pledged to allow such changes to be reviewed as part of the CLEC Industry Change Management Process (CICMP) process.²⁶ Finally, Qwest also added section 2.3 to the SGAT:²⁷

2.3 In cases of conflict between Qwest's IRRG product descriptions, methods and procedures, or a Technical Publication, and this Agreement, the rates, terms and conditions of this Agreement shall prevail over such IRRG product descriptions, methods and procedures, or a Technical Publication.

This new language solves AT&T's concern over conflicts between the Technical Publication and the SGAT by clarifying that the SGAT will govern in such circumstances.²⁸ The impasse arises because AT&T contends that the Technical Publication must be revised to its satisfaction before 271 can be satisfied.²⁹

Based on the foregoing, Qwest has more than fulfilled its 271 obligations.³⁰ The SGAT requires Qwest to provide unbundled dark fiber. To the extent the Technical Publication may be inconsistent with the SGAT, the SGAT governs. In addition, Qwest has amended the Technical Publication. Checklist item compliance depends on two elements: a legal obligation and performance.³¹ As demonstrated above, the legal obligation is not in doubt. Performance will be demonstrated through the OSS testing. The workshop process exists to determine approval of the legal obligation conditioned on

²⁵ Tr. at 1472:17-1473:7, 1537:12-22.

²⁶ Tr. at 1473:22-1476:1, 1479:23-1481:1.

²⁷ Tr. at 1532:1-1534:9, 1537:12-22, 1545:10-15; Exhibit 3 Qwest 23.

²⁸ Tr. at 1532:1-1533:5, 1535:5-1536:8.

²⁹ Tr. at 1536:9-20; 1545:18-1546:10. Past experience in this proceeding with joint revision of a technical publication with AT&T revealed it to be an arduous and time consuming process with little if any relevance to section 271. Tr. at 1546:11-18.

³⁰ Tr. at 1491:1-1493:11, 1536:24-1538:8, 1547:6-24.

³¹ *Kansas/Oklahoma Order* ¶28.

a demonstration of adequate performance as part of the OSS test. Consequently, the commission should find that the Technical Publication issue does not preclude a finding of conditional approval of Qwest's provisioning of dark fiber.

DATED this 8th day of March, 2001.



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